



2. Criminal Appeal No 188 of 1989  
MR KJ SHETHNA for the appellant  
Mr.Y.F.Mehta, APP for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE H.L.GOKHALE

Date of decision: 09/01/97

ORAL JUDGEMENT (N.J.Pandya,J.)

In fact, both these appeals relate to one and the same case by one and the same accused. The accused-appellant was facing trial for offences under Sec.302 and 447 both of Indian Penal Code, as also under Sec.135 of Bombay Police Act. He came to be convicted for all and was awarded life imprisonment for offence under Sec.302 and for offence under Sec.447, R.I. for one year was awarded. The substantive sentences were ordered to run concurrently. This was the order passed on 10-2-1989 by learned Additional Sessions Judge, Bhavnagar.

2. The case against the accused was that on 15-10-1989 at about 8.30 p.m. or so, the accused entered the field of complainant Bhagawan Lakhani near village Trupaj, Taluka Bhavnagar with an intention of committing offence and he was also carrying a stick in his hand. When he was challenged, he started running away and was given a chase by Gemabhai. The accused, suddenly, turned and gave a stick blow to Gema, followed by another. Gema fell down and the accused made good his escape. However, the complainant had an electric torch in his hand, with the help of which, he could identify the accused.

3. Gema having died, offence against the accused was registered under Sec.302 and there being trespass in the land of the complainant, offence under Sec.447 was also registered against the accused-appellant. Carrying a stick with him, led to the charge under Sec.135 of Bombay Police Act. However, no separate sentence has been awarded for that purpose.

4. The complainant has been examined. In support of the complaint, he has narrated the incident with one material omission with regard to the second blow having been given. It assumes importance, because, obviously, when a man enters with the intention of committing an offence, into the property of somebody else, there could hardly be an idea of killing any one. However, when he was challenged, he tried to run away and in order to

achieve the aim of making good his escape, if a blow is given, that act, on the part of the accused-appellant, will have to be evaluated in that light. When the first blow thus given is followed by second blow, the conduct of the accused-appellant assumes gravity of its own and has to be evaluated very carefully and in the aforesaid background.

5. The complaint, exh.25, refers to the fact that the person, who was running away, had given two blows, one was on the forehead and the other was on the head. The complainant has warned the accused, who was, by then, identified, to remain where he was and in the meantime, Hema had fallen on the ground. In the deposition of complainant, p.w.3, exh.23, Bhagawan Lakhani, he has stated that, after the first blow was given, the deceased had fallen down and thereafter, the accused had given second blow on the head of the deceased, who was lying on the ground. This omission has been brought out on record during the cross-examination of the Investigating Officer Mr.Manibhai Gababhai, p.w.7, exh.32, page 78 of the paper book. It is admitted, at page 79, that in the complaint, it has not been so stated that second blow was given after the deceased had fallen down.

6. This would mean that the immediate version given by the complainant in form of the said complaint Exh.25 is that two blows were given by the person running away with stick. This would be in keeping with his conduct, especially by the fact that when challenged, he was running from the field, which he had unauthorisedly entered.

7. Under the circumstances, we are inclined to accept the alternative submission made on behalf of the accused-appellant that the intention to kill was absent. Once this aspect is borne in mind, obviously, the matter will fall under Sec.304 and not under Sec.302. The accused has been apprehended in the month of January 1987 and ever since, as an undertrial prisoner and after the conviction, he has remained in jail through out. In our opinion, therefore, the period already undergone is enough for the purpose.

8. In the result, the appeals are partly allowed. The order of conviction and sentence passed by learned Additional Sessions Judge, Bhavnagar on 10th February 1989 is set aside. In its place, the accused is convicted under Sec.304 Part II. So far as the sentence is concerned, the period that the accused-appellant has undergone as an undertrial prisoner and as a convict in

the jail, is held to be sufficient for the purpose and he is ordered to be set at liberty forthwith, if not required in any other case.

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